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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. LATASHA YATES, Defendant and Appellant.	B215003 (Los Angeles County Super. Ct. No. TA103464)
In re LATASHA YATES, on Habeas Corpus.	B220636

APPEAL from a judgment of the Superior Court of Los Angeles County, Gary E. Daigh, Judge. Affirmed as Modified. Petition for habeas corpus denied.

Melanie K. Dorian, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Stephanie C. Brenan and Dawn S. Mortazavi, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant Latasha Yates guilty of assault (Pen. Code, § 240)[1] as a lesser included offense of the charged crime of assault with a deadly weapon (§ 245, subd. (a)(1)), and also found her guilty of first degree burglary (§ 459), criminal threats (§ 422), and assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(1)). The trial court sentenced her to a total term of six years in state prison: the upper term of six years for the first degree burglary and concurrent terms for the remaining counts. She appeals, contending: (1) the evidence was insufficient to support her conviction of count 4, assault by means of force likely to produce great bodily injury; (2) section 654 bars separate punishment for that crime and count 2, residential burglary; (3) imposition of the upper term for count 2 violated her constitutional rights, because the court relied on its conclusion, based on her prior record, that she is a "violent person" and "threatens people"; and (4) the abstract of judgment must be amended to reflect a two-year concurrent term for count 3, criminal threats. We order the judgment modified to stay the three-year term on count 4 under section 654, and also order that the amended abstract of judgment reflect a concurrent term of two years on count 3. We otherwise affirm the judgment.

BACKGROUND

Prosecution

The crimes arose from two successive assaults committed by defendant on a single day against Tajaun Castro, who resided in an apartment on West 95th Street in Los Angeles. Defendant, who used to live in the apartment building (she still had family there), and was present at the building almost every day.

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[1] All undesignated code references are to the Penal Code.

1. *The Assault Outside the Building*

On November 1, 2008, around 5:00 p.m., Castro arrived home from work and had a brief exchange outside the building with defendant, who showed her a movie poster. Perhaps 45 minutes later, Castro went to her car to get some CD's. Defendant came to the passenger side and mumbled something. Castro walked away, but encountered defendant again at the gate when Castro was returning to her apartment. When Castro approached, defendant, without warning, swung her fist, brushing Castro's nose. Castro asked what was wrong. Defendant pulled Castro's hair, pushed her against the gate, and struck her several times in the back, chest and head. When Castro tried to push her away, defendant bit a finger of Castro's right hand, and continued to do so until a neighbor pulled her off. (At trial, Castro displayed a scar from the bite.) Defendant continued the fight. Castro yelled that she could not breathe. Defendant yelled, "I'm going to kill this bitch." Shortly before the end of the fight, Castro heard neighbors yell that defendant had a knife. One or more neighbors ended the fight by pulling defendant off Castro.

As she began to run to her apartment, Castro saw a small folding knife on the ground. She did not see a knife in defendant's hand. She testified at one point that defendant cut a finger on her left hand with the knife during the fight. Later, she admitted that she did not know how she received the cut.

Castro testified that defendant was acting "psycho," and was exceptionally strong. Castro believed that she was high on PCP.

2. *The Assault Inside Castro's Apartment*

Castro returned to her apartment to treat her wounds. She then heard defendant outside yelling, "I'm about to fuck this bitch['s] car up." Castro called

911, and suddenly defendant ran into the apartment. Two neighbors, A.J. and Mark, came in after her to get her out.

Castro threw a spray bottle of oven cleaning solution at defendant. The bottle struck the wall and opened. Solution sprayed on defendant and the two neighbors.

Defendant grabbed Castro's pony tail. Castro could hear her "hair just ripping off [her] head" and "breaking off." She told the neighbors to get defendant off. Defendant pulled Castro to the floor and struck her several times on the back and head either with a fist or open hand. Eventually, one of the neighbors (A.J.) used a cigarette lighter to burn defendant's hand and make her release Castro's hair. The two neighbors then pushed defendant outside.

Castro called 911 again, and police arrived in a few minutes. Castro showed an officer a "whole pile of [her] hair" that she had combed out after the attack and collected. The officer would not take the hair. Castro later burned it. At the time of trial, Castro still had a bump "like a rock" near the left temple, and still suffered sharp pain "right there where the knot is" and occasional headaches. But she did not know whether the head injury was caused by the assault outside or inside her apartment.

3. *Arrival of the Police*

Los Angeles Police Officer Mel Celebertti and his partner arrived around 5:30 p.m. Castro pointed out defendant on the stairs. After defendant failed to respond to requests to come down, the officers took her into custody. Officer Celebertti's partner spoke to Castro in Celebertti's presence. Castro was shaking and crying. She said that she and defendant got into an altercation both inside and outside the apartment, and that defendant had cut her with a knife and bitten her.

Officer Celebertti observed a cut on one hand (it looked like a knife wound) and a bite mark on the other. Officer Celebertti did not see any hair in the apartment and did not know if his partner did. Paramedics treated Castro's injuries with ice packs and iodine.

Defense

Anthony Renfro, who was dating defendant's cousin, was outside the apartment building around 10:00 a.m. when he heard an argument between defendant and Castro. He went to investigate and saw a number of people from the building watching the argument. Castro went to her apartment, then returned and threw a cup of liquid in defendant's face. The two women "got in a little tussle," wrestling and pulling hair, but without punches. When they fell to the ground, some neighbors stopped the fight. Castro went inside and called the police. Renfro saw no bruises, cuts, or blood on Castro. Defendant remained by the stairs. Several police officers arrived minutes later.

DISCUSSION

I. Sufficiency of the Evidence

Defendant contends that the evidence is insufficient to support her conviction of count 4, assault by means of force likely to produce great bodily injury. We disagree. Of course, in reviewing the sufficiency of the evidence, we view the record in the light most favorable to the judgment. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

Count 4 was based on defendant's attack on Castro inside the apartment. Castro testified that in this attack, defendant grabbed her pony tail with sufficient force to break off a significant portion of her hair. Defendant pulled Castro to the

floor, where she struck Castro several times in the back of the head with her fist or open hand. During the assault, defendant held onto Castro's hair with such tenacity that she loosened her grip only after a neighbor burned her hand with a cigarette lighter.

"Great bodily injury is bodily injury which is significant or substantial, not insignificant, trivial or moderate." (*People v. Armstrong* (1992) 8 Cal.App.4th 1060, 1066.) Assault by means of force *likely* to produce great bodily injury requires only that such injury will more probably than not result from the assault; the crime does not require that such injury be inflicted. (*People v. Russell* (2005) 129 Cal.App.4th 776, 787.) Further, an assault by hands or fists alone may well be sufficient to prove the charge. (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028.)

Here, the ferocity of defendant's attack certainly qualifies as one likely to result in significant or substantial bodily harm. Defendant broke off or tore out a significant portion of Castro's hair which Castro later collected by combing her pony tail out. Defendant also pulled her to the floor, struck her on the back of the head, and did not let go of her pony tail until forced to do so by being burned. On this evidence, the force was sufficient to support the conviction of assault by means likely to cause great bodily injury.

Defendant finds several deficiencies in the evidence. She asserts that because the assault occurred near the kitchen, there was no explanation as to why Castro's hair ended up on the bathroom floor. But Castro explained that she "had it in the bathroom, because that's where I first started to comb it out to see how much damage there was."

Defendant notes that Officer Celebertti did not observe any hair. However, he also testified that he did not know whether his partner, who actually conducted the interview of Castro, saw any hair. In any event, any conflict between Officer

Celebertti's testimony and Castro's testimony that she presented the collected hair to an officer was for the jury, not us, to resolve.

Defendant also finds Castro's explanation of what became of the collected hair (she burned it) to be a factor suggesting her testimony was not credible. But that explanation, though unusual, does not render her testimony inadequate to support the conviction.

Defendant contends that the blows to the head were insufficient in themselves to prove use of force likely to produce great bodily injury. Even if true, we evaluate the evidence of the assault in its entirety. In that perspective, given the ferocity of the attack, there is no doubt that substantial evidence supports the conviction.

As we have noted, count 4 was based on the assault that occurred inside Castro's apartment. As part of her challenge to the sufficiency of the evidence, defendant contends that in his opening argument, the prosecutor argued an improper theory, namely, that in determining whether defendant was guilty of count 4, the jury could consider not simply injuries inflicted inside the apartment, but also injuries inflicted in the earlier assault outside the apartment. The assault outside the apartment was the basis of the charges in count 1: assault with a deadly weapon (a knife), with a great bodily injury allegation under section 12022.7, subdivision (a). On this count, the jury convicted defendant of the lesser included offense of simple assault.

Besides forfeiting the claim based on failing to object to the prosecutor's argument at trial (*People v. Morales* (2001) 25 Cal.4th 34, 43-44), defendant misunderstands the clear import of the argument. The prosecutor twice explained that count 4 related only to the assault that occurred inside the apartment. Moreover, when describing the evidence supporting the charge, the prosecutor

referred only to the acts that occurred inside the apartment: "So let's talk about the assault that happened inside. . . . The defendant broke in, grabbed her by the hair, forced her to the ground, [dragged] her around. Hair was pulled out. It's not that great bodily injury occurred. It's that it was likely to occur and you have to apply your reasonableness standards to it. Someone comes in in a rage yelling at you having just attacked you outside, grabs you by the hair and pulls you down to the ground. Is great bodily injury likely to occur in a . . . small kitchen? We saw a picture of the kitchen. Stove around. Countertop. A little table. A tile floor. Yeah, great bodily injury is likely to occur. Ripped out her hair. She was forced to call 911." Later, to the extent the prosecutor referred to the assault that occurred outside the apartment, it was only to point out that defendant was the aggressor in both attacks. No juror could reasonably have understood that the prosecutor was suggesting that in determining the level of force used in the attack inside the apartment, the jury could consider the *earlier* injuries inflicted in the attack outside the apartment. Indeed, such a suggestion is nonsensical.

Defendant contends that the supposed confusion created by the prosecutor's argument was exacerbated by the argument of defense counsel, who conflated the injuries that resulted from the assaults outside and inside the apartment. It is true that in discussing count 4 defense counsel did not distinguish between the incidents outside and inside the apartment. But the reason was twofold: first, the thrust of the argument was that Castro's testimony was not credible, because the injuries did not reflect the type of force that she described; and, second, in the defense version of events (as testified to by Anthony Renfro) there was only one incident, and it occurred outside the apartment building. The jury could not reasonably have been confused by defense counsel's argument. Indeed, in his rebuttal argument, the

prosecutor reiterated that count 4 was based on "the assault inside of the apartment."[2]

II. Sentence on Counts 2 and 4

Defendant contends that section 654 bars separate punishment for count 2 (residential burglary) and count 4 (assault by means of force likely to produce great bodily injury), because the burglary charge was premised on the theory that defendant entered Castro's apartment with the intent to commit the assault. Respondent agrees, as do we. (See *People v. Hester* (2000) 22 Cal.4th 290, 294 [section 654 bars concurrent term for assault where burglary was with intent to commit assault].) We order the three-year term on count 4 stayed under section 654.

Defendant also contends that the imposition of the upper term of six years on count 2 violated her Sixth Amendment right to a jury trial under *Cunningham v. California* (2007) 549 U.S. 270, because the factor cited by the court to justify the sentence – that defendant is a "violent person" who "threatens people" – was not supported by her prior record or any other facts found true by the jury. There was no Sixth Amendment violation. Defendant was sentenced under section 1170, subdivision (b), as amended in 2007. Under that statute, the court exercises its

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[2] Defendant has also filed a petition for writ of habeas corpus, contending that her trial counsel was ineffective for "(1) improperly assuming that the two assaults were a single incident or a continuous act, (2) failing to object and inviting the prosecution to argue this improper theory to the jury; and (3) failing to request proper jury instructions to prevent these errors." As we have explained, however, the jury was not misled in the manner defendant suggests. Thus, even assuming that trial counsel was ineffective, it is not reasonably probable that, in the absence of counsel's assumed errors, a more favorable outcome would have been reached. (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1241 [where ineffective assistance claim can more easily be rejected for lack of prejudice, that course should be followed].) We therefore deny the petition for writ of habeas corpus.

discretion in selecting among the three possible terms and states the reasons for the sentence, but makes no factual findings to impose an upper or lower term. (*People v. Sandoval* (2007) 41 Cal.4th 825, 846-847 (*Sandoval*).) Here, the trial court simply made a statement explaining its exercise of discretion. After summarizing defendant's prior record, which included (among other things) prior failures on probation and misdemeanor convictions of intimidating a witness and battery, the court stated: "Her record is bad, although I suppose you might argue the last conviction [for misdemeanor battery] was eight years before this incident, but her history with the criminal justice system is not good. She is a violent person. She threatens people. That would justify a high term." The court's explanation of the reason for its sentence did not violate defendant's Sixth Amendment right to a jury trial. (*Sandoval*, *supra*, 41 Cal.4th at p. 847.)

Defendant argues that the sentence was an abuse of discretion, because her most recent prior conviction (misdemeanor battery) was in 2000, approximately eight years before the instant crimes. But despite the passage of time, the court could reasonably view defendant's past violence (battery) and threatening behavior (intimidating a witness) as part of a pattern culminating in the present assaultive crimes. We find no abuse of the trial court's "broad discretion." (*Sandoval*, *supra*, 41 Cal.4th at p. 847.)

III. Sentence on Count 3

The parties agree (and we concur) that the abstract of judgment must be corrected to reflect the trial court's imposition of a concurrent two-year term on count 3 (the midterm) rather than the three-year concurrent term currently shown. We order the abstract so modified.

DISPOSITION

We order the judgment modified to stay the three-year term on count 4 under section 654. The superior court shall prepare an amended abstract of judgment so reflecting, which amended abstract shall also reflect a concurrent term of two years on count 3. A copy of the amended abstract shall be forwarded to the Department of Corrections and Rehabilitation. As amended, the judgment is affirmed. The petition for habeas corpus is denied.

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WILLHITE, J.

We concur:

EPSTEIN, P. J.

SUZUKAWA, J.